IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, Appellant,

v.

STATE OF WASHINGTON, Appellee.

MOTION OF STATE OF OREGON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

I. H. VAN WINKLE,
Attorney-General of the State of Oregon,

REX KIMMELL,
Assistant Attorney-General of the State of Oregon,

Counsel for State of Oregon as Amicus Curiae.

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May it Please the Court:

The undersigned, as counsel for State of Oregon, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

I. H. VAN WINKLE,
Attorney-General of the
State of Oregon,

Counsel for State of Oregon
as Amicus Curiae.

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BRIEF OF STATE OF OREGON, AS AMICUS CURIAE

I. INTEREST OF THE STATE OF OREGON

The appellant contends that members of the Yakima tribe of Indians have a present right to take fish outside the boundaries of their reservation at all "usual and accustomed places", and that the exercise of such right is not subject to regulation by state law. The right is claimed by virtue of paragraph 2 of Article III of the Yakima Treaty of June 9, 1855, which provides in part as follows:

> "The exclusive right of taking in all the streams where running through or bordering said reservation, is further secured to said confederates tribes and bands of Indians, as also the right of taking

fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them * * *."

Admittedly, some of the places on the Columbia river where the Yakima tribe of Indians were accustomed to and usually took fish at the time such treaty was executed were outside of the reservation, on the south bank of said river, and within the present jurisdiction of the State of Oregon.

The State of Oregon concedes the right reserved in such treaty but, like the State of Washington, insists that such right is subject to the police power of the state to regulate the manner in which the same shall be exercised by the Indians.

The State of Oregon, having an interest in the principles of law involved in the present case common to that of the appellee, respectfully submits this brief amicus curiae.

THE ISSUE

The ultimate issue to be determined in this cause can be stated as follows:

Can the state, by legislation duly enacted in the exercise of its police power, regulate the taking of fish by members of the Yakima Indian tribe at the usual and accustomed places outside the reservation and within the jurisdiction of the state?

The State of Oregon contends, as does the State of Washington, that within its jurisdiction no person or class of persons is immune from the operation of its

laws duly enacted pursuant to its police power. In this case the appellant claims immunity from the operation of the laws of the State of Washington regulating the taking of salmon and other food fish, by virtue of the treaty provision above quoted.

II. ARGUMENT

The appellee has filed a brief in which the decisions of this and other courts pertinent to the issue presented are exhaustively cited and reviewed, and because of the similar position of the two states, and in order to avoid repetition, Oregon respectfully asks leave to incorporate the arguments therein made into this brief by reference; and to urge such arguments in support of its theory of the law involved controlling the determination of the issue here presented.

Certain points, we believe, however, should be emphasized and they will be hereinafter discussed.

THERE IS NO CONFLICT BETWEEN THE STATE LAW OF WASHINGTON AND THE YAKIMA TREATY OF JUNE 9, 1855.

The treaty constitutes a grant of certain land by the Indian tribe to the United States government, impressed with an easement which forever guarantees to the members of the tribe the right of ingress to and egress from their "usual and accustomed places" of fishing, and the further right to erect temporary buildings thereon to cure the fish taken.

The treaty reserves to the Indian tribe certain land for their own exclusive occupancy and, although the

exclusive privilege of fishing thereon is retained, the members of the tribe are not restricted thereto but may otherwise fish when and as before, not exclusively, however, but only "in common with the citizens" of the state.

Other citizens by acquiring private title to lands adjoining the "usual and accustomed places" may exclude every one therefrom except members of the Yakima tribe of Indians; they cannot be excluded because of the pertinent reservation in the treaty.

This court interpreted the treaty as hereinabove set forth in the case of *United States v. Winans*, 198 U. S. 371, 49 L. ed. 1089, wherein it is stated, on page 381 of U. S. Reports, as follows:

> "* * * Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The

contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. * * *"

It is pertinent to note that the opinion in the above entitled case interprets the treaty liberally and we apprehend that it will be urged by the appellant as a binding judicial precedent, requiring every doubtful meaning in the language of the treaty to be resolved in his favor. Such fact emphasizes and lends force to the following statement appearing in the opinion on page 384:

"The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' *Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.*" (Italics ours.)

This court there held that the treaty did not conflict with or restrain the future state from the exercise of its police power at the Indians' "usual and accustomed places" of fishing in regulating fishing there.

The Supreme Court of the State of Michigan, in the case of *People vs. Chosa*, 252 Mich. 154, had before

it a question substantially the same as that here involved. After citing, with approval, the cases of *Ward v. Race Horse*, 163 U. S. 504, *United States v. Winans*, supra, and *Kennedy v. Becker*, 241 U. S. 556, the court states, on page 160:

> "These cases are conclusive on the effect of the treaties at bar. The treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the State.
>
> "* * * It must, therefore, be held that defendants are subject to the game laws of the State, on the lands covered by the treaties, to the same extent as the general public."

In the opinion last above cited the court also considered the effect on this question of the Act of Congress of February 8, 1887, 24 U. S. Stat. p. 390, section 6 (8 USCA, section 3; 25 USCA, section 349), which is as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have

been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life (and every Indian in Indian Territory), is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

In that regard the court states, on page 162:

"* * * Assuming, but not deciding, that the statutory exception, that their right to tribal or other property is not impaired by taking on American citizenship, applies to the treaty right to hunt and fish on the ceded land, it would only preserve that right as a private servitude or *profit a prendre*, and would confer no greater privilege of violating State laws than the owner of the land would have."

The well-reasoned opinions in the above cases, as well as those in the numerous other cases to the same effect cited in appellee's brief, quite clearly establish the principle that the treaty recognizes the right of the future state, in the exercise of its sovereign police power, to regulate fishing by the Indians within its jurisdiction in the same manner that it may regulate

fishing by other citizens. Such is the purpose and effect of the state law which the appellant in this instance has violated.

MEANING OF THE PHRASE "IN COMMON WITH CITIZENS OF THE TERRITORY"

It is interesting to note that in paragraph I, Article III, of the same treaty, another reservation of a right is made in the following language:

> "as also the right, in common with citizens of the United States, to travel upon all public highways."

In so far as this writer has been able to ascertain, no Yakima Indian has ever claimed immunity from the operation of state traffic laws enacted under the state police power to regulate the use of the public highways. The reason obviously is that the Indians consider that the phrase "in common with citizens of the United States" means subject to the same regulatory laws as other citizens.

We submit that if, by reason of the reservation in the treaty, the Yakima Indians are not subject to the regulatory laws governing fishing in the state of Washington they are not, for the same reason, subject to the regulatory laws governing the use of the public highways therein.

IF THE STATE LAW AND THE TREATY CAN NOT STAND TOGETHER WITHOUT CONFLICT THE STATE LAW MUST PREVAIL, FOR THE REASON THAT A STATE, UPON ITS ADMISSION INTO THE UNION, BECOMES POSSESSED OF

ALL RIGHTS AND POWERS EQUAL WITH ALL THE OTHER STATES.

Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal constitution. No other limitation is enforceable.

In the case of *Coyle v. Smith*, 211 U. S. 559, 55 L. ed. 853; this court established the rule above stated, and in doing so used the following language, page 573:

> "The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The effect of the opinion last above quoted from and that in the case of *Ward v. Race Horse*, 163 U. S. 504, is to establish the principle of law that that portion of an Indian treaty entered into by the government prior to the admission of a state into the Union, which restricts or limits the police power of the future state, is repealed or becomes ineffective by the act of admitting the state into the Union.

The case of *Escanaba Company v. Chicago*, 107 U. S. 678, establishes the rule of law applicable in this

case in the following clear language found on page 688 of the Reporter:

> "Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of constitutional right and power is the condition of all the States of the Union, old and new."

The State of Washington was admitted to the Union subsequent to the Yakima treaty, fully possessed of all rights of dominion and sovereignty. Even though, as heretofore pointed out, the treaty constituted a servitude upon the land adjoining the usual and accustomed fishing places of the Indians, it did not place any servitude or limitation upon the state's sovereign police power.

CONCLUSION

The State of Oregon has an interest in the propagation and conservation of fish in the Columbia river in common with that of the State of Washington. In furtherance of that interest Oregon has enacted laws governing the taking of salmon and other food fish therefrom. (Title 83, Chap. 5, Article I, Oregon Com-

piled Laws Annotated.) Within the jurisdiction of the State of Oregon are "usual and accustomed places" of fishing of Yakima Indians, where they may exercise their treaty rights to take fish "in common with the citizens" of the state. At those places neither the Indians nor the white citizens may exclude the other from taking fish. The adjacent land is subject to the easement of the Yakima Indians for the purposes mentioned in the treaty.

The states were admitted into the Union with full and unimpaired sovereign police power to regulate their internal affairs. There is no language in the Yakima Indian treaty which reserves to the Indians immunity from the operation of those powers to regulate fishing within the respective jurisdictions or otherwise.

This case should be affirmed.

Respectfully submitted,

I. H. VAN WINKLE,
Attorney-General of the
State of Oregon,

REX KIMMELL,
Assistant Attorney-General
of the State of Oregon.

Counsel for State of Oregon,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1941.

Sampson Tulee, Appellant, vs. State of Washington. } On Appeal from the Supreme Court of the State of Washington.

[March 30, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The appellant, Sampson Tulee, a member of the Yakima tribe of Indians, was convicted in the Superior Court for Klickitat County, Washington, on a charge of catching salmon with a net without first having obtained a license as required by state law.[1] The Supreme Court of Washington affirmed. 7 Wn. 2d 124. The case is here on appeal under Section 237(a) of the Judicial Code, 28 U. S. C. 344(a), the appellant challenging the validity of the Washington statute as applied to him on the ground that it was repugnant to a treaty made between the United States and the Yakima Indians.

In 1855, the Yakimas and other Indians owned and occupied certain lands in the Territory of Washington, which the United States wished to open up for settlers. May 29, 1855, representatives of the government met in council with representatives of the Indians, and after extended discussions lasting until June 11, the Indians agreed to a treaty, under which they were to cede 16,920 square miles of their territory, reserving 1,233 square miles for the confederated tribes represented at the meeting. As consideration for the cession by the Indians, a cession which furthered the national program of transforming wilderness into populous, productive territory, the government agreed to pay $200,000; to build certain schools, shops, and mills and keep them equipped for twenty years; to erect and equip a hospital; and to provide teachers and various helpers for twenty years. This agreement was ratified and proclaimed as a treaty in 1859. 12 Stat. 951.

[1] "It shall be unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever except with hook and line . . . unless license so to do has been first obtained. . . ." Remington's Revised Statutes of Washington, Section 5693. "For each dip bag net license for the taking of salmon on the Columbia River, [the license fee shall be] five dollars. . . ." *Id.* (vol. 7, 1940 supp.), Section 5703.

The appellant claims that the Washington statute compelling him to obtain a license in order to fish for salmon violates the following provision of Article III of the treaty:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The state does not claim power to regulate fishing by the Indians in their own reservation. *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655. Nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the act which created the Washington Territory and the enabling act which admitted Washington as a state. 10 Stat. 172; 25 Stat. 676. Relying upon its broad powers to conserve game and fish within its borders,[2] however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense which, although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be construed as an impairment of this right and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the "usual and accustomed places", free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[3] it forecloses the state from charging the Indians a fee of the kind in question here.

In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U. S. 371, this Court held that, despite the phrase "in common with citizens of the

[2] Geer v. Connecticut, 161 U. S. 519; Ward v. Race Horse, 163 U. S. 504, 507; Patsone v. Pennsylvania, 232 U. S. 138; Lacoste v. Dept. of Conservation, 263 U. S. 545, 549.

[3] Cf. Kennedy v. Becker, 241 U. S. 556. See United States v. Winans, *supra*, 384.

territory". Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U. S. 375, 384; *Seufert Bros. Co.* v. *United States, supra*, 198-199.

Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.

The judgment of the Supreme Court of Washington is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.